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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GINA CASTLEBERRY
PREWITT et al.,

Plaintiffs and Respondents,

v.

KAMBIZ BENIAMIA OMIDI
et al.,

Defendants and Appellants.

B280674

(Los Angeles County
Super. Ct. No. BC469464)

APPEAL from an order of the Superior Court of
Los Angeles County, Monica Bachner, Judge. Reversed and
remanded with directions.

Law Offices of Kamille Dean, Kamille Dean and Francis
Flynn for Defendants and Appellants.

No appearance by Respondents.

Kambiz “Julian” Beniamia Omid, Michael Omid and Cindy Omid appeal from an order denying their petition to compel arbitration in this action for medical malpractice and fraud brought by Gina Castleberry Prewitt and her husband Adrian Prewitt. The Omidis petitioned to compel arbitration based on an arbitration contract Prewitt had signed prior to undergoing an endoscopy.¹ The superior court denied the petition, finding the Omidis had not established they were entitled to enforce the arbitration agreement as nonsignatories and, even if they could enforce it, the claims against them were not within the scope of the arbitration agreement. We reverse and remand to the superior court to issue a new order granting the petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Medical Malpractice Action

On September 12, 2011 the Prewitts filed a complaint, and on June 25, 2012 a second amended complaint, against Weight Loss Centers; 1-800-Get-Thin; Marvin Anton Perer, M.D.; Modern Institute for Plastic Surgery; Valencia Ambulatory Surgery Center, LLC; Top Surgeons, LLC; New Life Surgery Center; and Nuri Sabbagh. The second amended complaint alleged causes of action against various groups of defendants for medical malpractice, intentional misrepresentation/fraud, negligent misrepresentation, negligent referral, negligent hiring and loss of consortium.

¹ Because Gina Castleberry Prewitt was the patient and signatory of the arbitration agreement, we use Prewitt in the singular to refer solely to her.

According to the complaint Prewitt contacted 1-800-Get-Thin by telephone in August 2010 after seeing television commercials and billboards advertising laparoscopic gastric band surgery for weight loss, known as “lap band” surgery. The 1-800-Get-Thin operator who answered Prewitt’s call told her the procedure was safe, effective and covered by most health insurance plans. Prewitt provided her health insurance information to the operator so that 1-800-Get-Thin could confirm the procedure would be covered. A few days later an operator called Prewitt and told her the procedure was covered under her insurance plan. Prewitt was then referred to a free seminar where she could get more information.

Prewitt attended the seminar on August 14, 2010 at the Weight Loss Center in Long Beach. After an informational presentation, during which the presenting surgeon stated the organization had the best team of weight loss doctors in the country, Prewitt met privately with a representative. The representative told Prewitt she was an excellent candidate for the lap band procedure, but would first need to undergo certain screening procedures. Prewitt was scheduled for an endoscopy on September 8, 2010 at the Valencia Ambulatory Surgery Center in Valencia. Dr. Perer performed the procedure, during which he removed a sample of tissue for biopsy.

On September 12, 2010 Prewitt went to the emergency room with pain and swelling in her neck. She discovered the endoscopy had resulted in a large tear in her esophagus, which required emergency surgery to repair and drain a large abscess. Prewitt underwent multiple additional surgeries to clean the wound and control the infection. She was also dependent on a

feeding tube for a prolonged period. She alleged the endoscopy performed by Dr. Perer had been unnecessary.

Prewitt alleged she later discovered that, when the 1-800-Get-Thin operator had initially contacted her insurance company in August 2010, the operator had been told Prewitt's insurance plan did not provide coverage for bariatric surgery, including the lap band procedure, but would provide out-of-network benefits for other types of procedures, such as an endoscopy. Accordingly, Prewitt alleges, "the marketers lied to [her] about her coverage" so that she would attend the free seminar and agree to undergo unnecessary screening procedures. Prewitt also asserted 1-800-Get-Thin and its associates billed her insurance company at inflated rates and billed for procedures that were not actually performed.

In describing each defendant's participation in the alleged activities, the second amended complaint stated that 1-800-Get-Thin provided marketing, administrative and patient referral services to the other defendants, including operating the call centers and determining the insurance benefits of potential patients. The lap band surgeries and other medical procedures were conducted at Beverly Hills Surgery Center, New Life Surgery Center and Valencia Ambulatory. Top Surgeons, which also did business under the name Weight Loss Centers, provided nonmedical administrative services to the surgery centers, including contracting with medical professionals, administering contracts and leasing office space. Top Surgeons was also alleged to have played some role in soliciting patients.

The second amended complaint alleged that, "at all times herein mentioned, each defendant was the agent of each and all of the other defendants and was acting within the course and

scope of said agency.” It was also alleged that Top Surgeons, 1-800-Get-Thin and Valencia Ambulatory “conducted a joint venture or other business combination . . . the purpose of which was to profit from the acquisition of patients on whom lap band surgeries and other procedures would be performed.” Finally, it was alleged “that all aspects of the 1-800-Get-Thin enterprise and related entities were jointly owned, operated and controlled” and the alleged acts “were authorized and approved by the managing officers, agents and directors of each corporate defendant, and were ratified by said managing officers, agents and directors with full knowledge of the acts and omissions of the defendants’ agents and employees.” The Omidis were not mentioned by name in the second amended complaint.

2. The Fraud Action

On November 30, 2012 the Prewitts initiated a new action by filing a complaint, and on January 31, 2013 a first amended complaint, against the Omidis; 1-800-Get-Thin, LLC;² Top Surgeons LLC; California Hospital Management & Collections, Inc.; De Vida USA, LLC; and Surgery Center Management, LLC. The first amended complaint alleged causes of action for fraud and deceit, negligent misrepresentation, deceptive business practices (Civ. Code, § 1750 et seq.), unfair competition (Bus. & Prof. Code, § 17200 et seq.) and loss of consortium.

The events alleged in the first amended complaint were nearly identical to those alleged in the malpractice action, but

² The medical malpractice complaint named “1-800-Get-Thin” as a defendant, while the fraud complaint named “1-800-Get-Thin, LLC.” Despite the different designations, it appears both complaints refer to the same entity.

included additional detail regarding the allegedly false and misleading medical bills submitted to Prewitt's insurance company. Prewitt also alleged she incurred copayment and deductible charges for procedures that were not necessary, were billed incorrectly or were never actually performed.

The first amended complaint identified the Omidis as "principal[s]/owner[s] of numerous of the outpatient surgery centers, promotional and billing entities described below as part of the 1-800-Get-Thin enterprise, including Valencia Ambulatory Surgery Center which participated in the care of Plaintiff." Cindy Omid was alleged to be the chief executive officer of Valencia Ambulatory and Michael Omid the chief of staff and director of surgery of Top Surgeons. Prewitt also alleged each of the defendants was the "agent, servant, and/or employee" of each defendant and "was acting within the course and scope of said agency, employment and/or conspiracy with the full knowledge, consent, permission and ratification of each of their co-defendants."

The first amended complaint contained a section titled "Alter Ego and Successor Liability," which alleged the defendants were "alter egos of each other" and "are and have been controlled by the same officers, directors, principals, shareholders, and that each defendant owned, occupied, managed, and controlled ambulatory surgical hospital facilities" Prewitt further alleged the defendants "administered, governed, controlled, managed and directed all of the necessary functions, activities and operations of said facilities, including its medical surgical and nursing care." Specifically, the first amended complaint alleged "all of the marketing, surgical centers and billings are controlled by the Omid defendants."

The medical malpractice action and the fraud action were consolidated by the superior court on November 13, 2015.³

3. *The Petition To Compel Arbitration*

On October 27, 2016 the Omidis petitioned to compel arbitration of the claims against them based on an arbitration agreement Prewitt had signed prior to her endoscopy. The agreement was titled “Physician-Patient Arbitration Agreement” and was signed by Prewitt on September 8, 2010.⁴ Pursuant to Code of Civil Procedure section 1295 (section 1295), the first article of the agreement stated: “Article 1: Agreement to Arbitrate: It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under the contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are

³ In June 2012, prior to the filing of the fraud action, 1-800-Get-Thin, Top Surgeons and Valencia Ambulatory (collectively, the 1-800-Get-Thin defendants) petitioned to compel arbitration of the malpractice action. The superior court denied the petition, finding the 1-800-Get-Thin defendants had waived the right to compel arbitration by participating in the litigation. We affirmed the superior court’s ruling. (See *Prewitt v. 1-800-Get-Thin* (June 10, 2014, B246574) [nonpub. opn.])

⁴ In support of the petition the Omidis’ attorney submitted a declaration attaching excerpts of Prewitt’s deposition testimony in which she authenticated her signature on the arbitration agreement.

giving up their constitutional rights to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.”⁵

Article 2 of the agreement stated: “All Claims Must be Arbitrated: It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or service provided by the physician including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. . . . All claims for monetary damages exceeding the jurisdictional limit of the small claims court against the physician, and the physician’s partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them, must be arbitrated, including, without limitation, claims for loss of consortium, wrongful death, emotional distress or punitive damages.”

The agreement included a signature line for the physician or “authorized representative.” The signature on that line is

⁵ Section 1295, subdivision (a), provides the quoted language must be the first article of “[a]ny contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider.” Subdivision (b) states: “Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type: [¶] ‘NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.’” The agreement signed by Prewitt contained this notice in the required font.

illegible, and the record contains no evidence regarding the individual who signed the agreement for the physician. Underneath the signature line was an additional line stating, "Print or Stamp Name of Physician, Medical Group or Association Name." That line contained the handwritten notation, "Valencia Amb. Surg. Center."

In their petition to compel arbitration the Omidis argued they were entitled to enforce the agreement to arbitrate despite being nonsignatories because they were third party beneficiaries of the agreement and agents/employees of Valencia Ambulatory. The Omidis further argued the claims against them were within the scope of the arbitration agreement because the wrongdoing alleged related to the medical treatment provided. In their opposition the Prewitts argued the Omidis had failed to establish they had an agency or employment relationship with the physician referred to in the agreement or were intended third party beneficiaries of the agreement. The Prewitts further argued the claims against the Omidis related to misrepresentation of insurance coverage and fraudulent billing, which did not arise out of the provision of medical services.

The court found the Omidis had failed to prove the existence of an arbitration agreement between them and the Prewitts or to establish they were agents of a signatory or third party beneficiaries to the agreement. The court further found the claims against the Omidis arose out of advertising, promotional and billing activities and, as such, fell outside the scope of the arbitration agreement.

DISCUSSION

1. *The Prewitt's Bankruptcy Proceeding Does Not Preclude Disposition of This Appeal*

In February 2018, prior to filing their opening brief on appeal, the Omidis requested a stay of this proceeding. The Omidis explained their counsel had recently learned that, in May 2015, the Prewitts had filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. §§ 701-784). Despite filing for bankruptcy protection while this case was ongoing, the Omidis stated, the Prewitts had not informed the parties to this action or the superior court of their bankruptcy petition. Further, the Omidis alleged, the Prewitts had failed to identify this lawsuit as an asset in their bankruptcy filings or otherwise inform the bankruptcy court or bankruptcy trustee of its existence. The Prewitts were granted a discharge in the bankruptcy case in September 2015, and the bankruptcy action was terminated.

In their request for a stay of the appeal, the Omidis argued the bankruptcy discharge enjoined any actions against the Prewitts, including enforcement of the arbitration agreement in this case. (See 11 U.S.C. § 524.) Further, the Omidis contended the Prewitts no longer had standing to prosecute this action because the cause of action belonged to the bankruptcy estate. Accordingly, the Omidis requested we stay the appeal and modify the automatic stay of the superior court proceedings to allow the Omidis to seek appropriate relief in that court. We directed the Prewitts to file a response to the Omidis' motion. After the Prewitts failed to file a response, we denied the Omidis' motion for a stay and instructed them to include any arguments arising from the bankruptcy proceedings in their opening brief.

In April 2018, one week before their opening brief was due, the Omidis moved for summary reversal of the superior court's order on the ground the "proper resolution of this case is so obvious and without dispute." The Omidis repeated their arguments that the Prewitts lacked standing to prosecute this action and the bankruptcy discharge prohibited further proceedings. The Prewitts opposed the motion, arguing the discharge injunction did not apply to claims brought by the debtor and the purported lack of standing could be cured, if necessary, by receiving permission from the bankruptcy trustee to prosecute the case. We denied the motion for summary reversal. The Omidis' opening brief repeats the arguments regarding the bankruptcy discharge and standing.

The Omidis' arguments betray a fundamental misunderstanding of the applicable bankruptcy laws. "The filing of a bankruptcy proceeding operates as a stay of 'the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case.' (11 U.S.C. § 362(a)(1).) When a bankruptcy discharge is entered, it replaces the automatic stay with a permanent injunction against such judicial proceedings."⁶ (*Weakly-Hoyt v. Foster* (2014) 230 Cal.App.4th 928, 931.) However, the automatic stay and,

⁶ Title 11 United States Code section 524 prescribes the legal effect of a discharge: "A discharge in a case under this title-- [¶] . . . [¶] . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived"

therefore, the discharge injunction apply only to actions brought “against the debtor”; they are “inapplicable to superior court actions *initiated* by the debtor.” (*Shah v. Glendale Federal Bank* (1996) 44 Cal.App.4th 1371, 1375; accord, *Shorr v. Kind* (1991) 1 Cal.App.4th 249, 253 [when bankruptcy debtor is plaintiff, “the state court does not lose jurisdiction, time periods are not tolled and the automatic stay provision[s] . . . are inapplicable”]; see also *In re Munoz* (Bankr. 9th Cir. 2002) 287 B.R. 546, 554, fn. 8 [“[i]t warrants clarification and emphasis that the § 362 automatic stay is broader than the discharge injunction”].)

Contrary to the Omidis’ argument, the automatic stay and discharge injunction do not apply to this proceeding in which the debtors (the Prewitts) are the plaintiffs. It is of no moment that the Prewitts are the respondents on appeal. (See *Shah v. Glendale Federal Bank*, *supra*, 44 Cal.App.4th at p. 1377 [“whether an action is ‘against the debtor’ within the meaning of section 362(a)(1) is determined by the debtor’s status at the inception of the action; regardless whether the debtor is the appellant or the respondent”]; *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 332-333; see also *Parker v. Bain* (9th Cir. 1995) 68 F.3d 1131, 1135-1136 & fn. 6, and cases cited therein.) As a matter of equity, “the automatic stay should not tie the hands of a defendant while the plaintiff debtor is given free rein to litigate.” (*In re Merrick* (Bankr. 9th Cir. 1994) 175 B.R. 333, 338; accord, *In re White* (Bankr. 9th Cir. 1995) 186 B.R. 700, 704 [“[t]here is . . . no policy of preventing persons whom the bankrupt has sued from protecting their legal rights”].) Because the Omidis are protecting their legal rights in an action brought by the debtor, they do not violate the discharge provision by pursuing this appeal.

Likewise, even if the Prewitts lack standing to prosecute this action, as the Omidis argue, that would not deprive this court of jurisdiction over the appeal. The Omidis are correct that, “after a person files for bankruptcy protection, any causes of action previously possessed by that person become the property of the bankrupt estate. (See 11 U.S.C. §§ 541(a)(1) and 323)” (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1001.) However, even if the Prewitts are no longer the real party in interest, they can remedy the situation by seeking authority from the bankruptcy court to pursue the action or by amending their pleading to substitute the real party in interest. (See *id.* at p. 1000 [reversing judgment based on debtor-plaintiff’s lack of standing because “leave to amend should have been granted either to substitute in the real party in interest (the bankruptcy trustee) or to obtain the trustee’s abandonment of the claim”].) Regardless, whether the Prewitts’ pleading is sufficient to state a claim as a matter of law, based on lack of standing or otherwise, is an issue that must be addressed in the superior court or before the arbitrator in the first instance. On remand, the Omidis are free to seek appropriate relief from the superior court, the arbitrator and/or the bankruptcy court.

2. *The Superior Court Erred in Denying the Motion To Compel Arbitration*

a. *Governing law and standard of review*

Code of Civil Procedure section 1281.2 requires the superior court to order arbitration of a controversy “[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate such controversy . . . if it

determines that an agreement to arbitrate the controversy exists.” As the language of this section makes plain, the threshold question presented by every petition to compel arbitration is whether an agreement to arbitrate exists. (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228 [133 S.Ct. 2304, 2306, 186 L.Ed.2d 417] [it is an “overarching principle that arbitration is a matter of contract”]; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*) [““a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit””]; *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787 “[t]here is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate”].)

Because arbitration is a matter of contract, generally ““one must be a party to an arbitration agreement to be bound by it or invoke it.”” (*Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1416.) However, “[t]here are circumstances in which nonsignatories to an agreement containing an arbitration clause can be compelled to arbitrate under that agreement. As one authority has stated, there are six theories by which a nonsignatory may be bound to arbitrate: “(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary.”” (*Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 469; accord, *Marenco*, at p. 1417 [“[e]nforcement is permitted where the nonsignatory is the agent for a party to the arbitration agreement”]; *DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353 [agent’s agreement to arbitrate on behalf of nonsignatory principal is an

exception to the general rule that one must be a party to an arbitration agreement to invoke it or be bound by it].)

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence an agreement to arbitrate a dispute exists. (*Pinnacle, supra*, 55 Cal.4th at p. 236; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 240.) If, after an agreement is proved, the party resisting arbitration claims a defense to the enforcement of the agreement, the burden shifts to that party to prove by a preponderance of the evidence any fact necessary to that defense. (*Rosenthal*, at p. 413; accord, *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

We review de novo the superior court's interpretation of an arbitration agreement when, as here, that interpretation does not depend on the resolution of conflicting extrinsic evidence. (*Pinnacle, supra*, 55 Cal.4th at p. 236.) Our de novo review includes the legal determination whether, and to what extent, nonsignatories to an arbitration agreement can enforce the arbitration clause, as well as the scope of the arbitration agreement. (*DMS Services, LLC, supra*, 205 Cal.App.4th at p. 1352; *In re Tobacco Cases I* (2004) 124 Cal.App.4th 1095, 1105.)

b. *The Omidis can enforce the arbitration agreement as nonsignatories*

As discussed, the arbitration agreement required Prewitt to arbitrate all claims exceeding a certain monetary amount against “the physician, and the physician’s partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them.” The “physician” was not

identified or defined in the agreement other than on the signature line and the line instructing, “Print or Stamp Name of Physician, Medical Group or Association Name.” While the signature of the individual who signed the document is illegible, it is undisputed that he or she signed the document on behalf of Valencia Ambulatory. The Omidis argue they can enforce the arbitration agreement because they were alleged to be the principals, employees and agents of Valencia Ambulatory.

In determining whether a nonsignatory can compel arbitration with a signatory based on an agency relationship, “it is critical to ask who is seeking to bind whom, and on what basis; the question of whether a principal’s acts bind an agent is fundamentally different from the question of whether an agent’s acts bind a principal.” (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 303.) It is also relevant whether the nonsignatory is seeking to enforce the arbitration agreement, as in this case, or is being compelled to arbitrate over objection. “It is one thing to permit a nonsignatory to relinquish his [or her] right to a jury trial, but quite another to compel him [or her] to do so.” (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 991; accord, *DK Joint Venture 1 v. Weyand* (5th Cir. 2011) 649 F.3d 310, 316 [“it matters whether the party resisting arbitration is a signatory or not.”].)

Courts look to traditional principles of contract and agency law to determine whether a nonsignatory can enforce an arbitration agreement signed by its principal or agent. (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840.) An agency relationship with a signatory, without more, is generally insufficient to allow a nonsignatory to enforce an agreement to arbitrate regardless of whether the

nonsignatory is the agent or the principal of the signatory. “Persons are not normally bound by an agreement entered into by a corporation in which they have an interest or are employees.” (*Id.* at p. 860.) However, courts have permitted a nonsignatory defendant to compel arbitration with a signatory plaintiff “where there is a connection between the claims alleged against the nonsignatory and its agency relationship with the signatory.” (*Id.* at p. 863; accord, *Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614 [nonsignatory defendants could enforce arbitration agreement because each was alleged to have “acted as an agent of [signatory defendant] in connection with the acts and omissions” described in the complaint]; *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 788 [nonsignatory defendant could enforce arbitration agreement when it was alleged to have been agent of signatory “in [its] dealings with [plaintiff]”].) To put it another way, “[n]onsignatory defendants may enforce arbitration agreements ‘where there is sufficient identity of parties.’” (*Marenco v. DirectTV LLC, supra*, 233 Cal.App.4th at p. 1417; cf. *Jensen v. U-Haul Co. of California, supra*, 18 Cal.App.5th at p. 301 [“a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim”].)

The Omidis argue they are entitled to enforce the arbitration agreement because they were alleged to have been in an agency relationship with Valencia Ambulatory. As discussed, the first amended complaint in the fraud action alleged the Omidis were the principals and owners of Valencia Ambulatory and Cindy Omidis was the chief executive officer. The first amended complaint also alleged that the Omidis “administered,

governed, controlled, managed and directed all of the necessary functions, activities and operations” of ambulatory surgical hospital facilities in Southern California and controlled the marketing, surgical centers and billing operations of the “1-800-Get-Thin enterprise.”

While these agency allegations are not particularly specific, they are sufficient in this case to permit the Omidis to enforce the arbitration agreement as agents and/or principals of Valencia Ambulatory. The Prewitts’ theory of liability as pleaded explicitly relies on allegations that the Omidis had complete control over all aspects of the activities of the other defendants, including Valencia Ambulatory, and that an agency relationship existed between them. The Prewitts cannot seek to hold the Omidis liable pursuant to an agency or alter ego theory while simultaneously refusing to arbitrate with them based on the assertion they are not agents or employees of the signatory for purposes of the arbitration agreement. (See *Thomas v. Westlake*, *supra*, 204 Cal.App.4th at p. 614 “[h]aving alleged all defendants acted as agents of one another, [plaintiff] is bound by the legal consequences of his allegations. . . . Moreover, it would be unfair to defendants to allow [plaintiff] to invoke agency principles when it is to his advantage to do so, but to disavow those same principles when it is not”]; cf. *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 220 [“a signatory to an agreement with an arbitration clause cannot “have it both ways”; the signatory ‘cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a non-signatory.’”]; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1285 “[b]y suing

[nonsignatory defendants] for breach of the Agreement on the ground that they are [signatory's] alter egos . . . [nonsignatories] are 'entitled to the benefit of the arbitration provisions'"].) This result is particularly appropriate where, as here, the agreement itself explicitly stated Prewitt agreed to arbitrate claims against Valencia Ambulatory's agents, employees and associates and the employees thereof.

c. The agreement to arbitrate covers this dispute

"Once the existence of a valid arbitration clause has been established, '[t]he burden is on "the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute."'" (*Titolo v. Cano* (2007) 157 Cal.App.4th 310, 316.) "[A]n order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute and that all doubts are to be resolved in favor of coverage." (*Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 414; accord, *Titolo*, at p. 317 ["resolution of disputes through the process of arbitration is favored in this state, and any doubt as to the meaning and interpretation of an arbitration agreement is resolved in favor of requiring arbitration"].) "In determining the scope of an arbitration clause, '[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made.'" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.)

As discussed, the arbitration agreement, by its terms, covers "any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were

unnecessary or unauthorized or were improperly, negligently, or incompetently rendered.” In resisting arbitration in the superior court the Prewitts insisted the “root of this action is a misrepresentation as to insurance coverage and fraudulent referrals by non-health care providers,” which, they argued, fell outside the scope of the statutorily required language in the agreement to arbitrate medical malpractice claims. (See § 1295.)

Contrary to the Prewitts’ assertions, courts have held the quoted language applies to causes of action beyond the negligent performance of medical procedures. In *Titolo v. Cano, supra*, 157 Cal.App.4th at pages 317-318, the parties’ arbitration agreement contained the same language as the Prewitt agreement. The plaintiff brought causes of action for breach of fiduciary duty, violation of privacy rights, intentional interference with economic advantage and negligence based on the physician’s allegedly wrongful communications with the plaintiff’s insurer. The court found the parties’ agreement to arbitrate “any dispute as to medical malpractice” applied to these claims because “[c]ommunications between physicians and insurance companies regarding the diagnosis and treatment of patients are a necessary part of the provision of medical services to those patients.” (*Id.* at p. 318; see also *Herrera v. Superior Court* (1984) 158 Cal.App.3d 255, 262 [“section 1295 was not intended to be limited only to negligence actions, otherwise the Legislature would not have included a definition of malpractice in the waiver form which covers more than negligence”; claims for fraud and negligent misrepresentation based on billing for unperformed procedures and falsely informing patient surgery was necessary were subject to arbitration pursuant to agreement to arbitrate medical malpractice claims].)

In addition, the parties here not only agreed to arbitrate medical malpractice disputes, as defined by section 1295, but also included language in the agreement stating, “It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or service provided by the physician,” and “All claims for monetary damages exceeding the jurisdictional limit of the small claims court” would be arbitrated. Thus, the agreement does not apply only to medical malpractice claims, but to “all claims” that “arise out of or relate to treatment or service provided.”

In light of the broad provisions of the parties’ arbitration agreement, the claims against the Omidis fall comfortably within the scope of arbitrable claims. The Omidis are alleged to have controlled and directed the individuals and entities who communicated with Prewitt and her insurance company, explained potential treatment to her and misstated her insurance benefits, which she alleges induced her to agree to treatment. The Omidis are also alleged to have owned, operated and controlled the entity that hired and/or contracted with the medical personnel who treated Prewitt, as well as the facility where Prewitt received that treatment. Furthermore, one basis of Prewitt’s claims is the unnecessary nature of the medical services provided, which falls squarely within the plain language of the arbitration agreement, as does the cause of action for loss of consortium. Accordingly, we cannot say with positive assurance the arbitration clause is not susceptible of an interpretation that covers the allegations in this case.

DISPOSITION

The order denying the Omidis' petition to compel arbitration is reversed, and the superior court is directed to enter a new order granting the petition. On remand the court will have the opportunity to exercise its discretion under Code of Civil Procedure section 1281.2 to determine the timing of the arbitration and the proceedings with parties not subject to the arbitration agreement. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.